

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

BAODING TIANWEI GROUP CO.,	)	
LTD., a foreign entity,	)	
	)	03:07-CV-00862-HU
Plaintiff,	)	
	)	
v.	)	OPINION AND
	)	ORDER
PACIFICORP, an Oregon	)	
corporation	)	
	)	
Defendant.	)	

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PACIFICORP, an Oregon  
corporation,  
Third Party Plaintiff,  
v.

WINBO INTERNATIONAL  
CORPORATION, a California  
corporation, and SUPER  
POWER EQUIPMENT CO., a  
California corporation,  
Third Party Defendant.

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SUPER POWER EQUIPMENT CO.,  
WINBO INTERNATIONAL  
CORPORATION,  
Counterclaimants,  
v.

1 BAODING TIANWEI GROUP CO.,

2 Counter Defendant.

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13 HUBEL, Magistrate Judge

### 14 **Opinion and Order**

15 This matter comes before the Court on Plaintiff's Motion For  
 16 An Indicative Ruling Pursuant to Fed. R. Civ. P. 62.1 (doc. #160).  
 17 The issue presented by this motion is whether the Court should  
 18 grant a motion for relief from its September 30, 2010, Opinion and  
 19 Order. For the reasons set forth below, Plaintiff's motion is  
 20 DENIED.

### 21 **Background**

22 Plaintiff Baoding Tianwei Group Co., Inc. ("Baoding") brought  
 23 this action on June 11, 2007, against Pacificorp, asserting claims  
 24 for breach of contract based on Pacificorp's alleged failure to pay  
 25 in full for two electrical transformers purchased from Baoding. On  
 26 October 19, 2007, the court granted Pacificorp's motion to join  
 27 Winbo International Corporation ("Winbo") and Superpower Equipment  
 28 Company (collectively "Super Power") as defendants (doc. #28). On

1 March 14, 2008, Super Power filed counterclaims against Baoding for  
2 breach of contract, contribution, indemnity, and declaratory  
3 relief. (Doc. #43). On the same day, Super Power filed a motion  
4 to stay and compel arbitration with the China International  
5 Economic and Trade Arbitration Commission ("CIETAC"), pursuant to  
6 a written agreement designated as the Supplementary Agreement.  
7 (Doc. #44). On March 28, 2008, Pacificorp filed a motion for  
8 summary judgment. (Doc. #49). On April 10, 2008, while the motion  
9 to stay was pending, Baoding filed a reply to Superpower's answer  
10 and counterclaims, but did not assert any claims, although it  
11 reserved a right to do so. (Doc. #64).

12 In an Opinion and Order entered on September 10, 2008, the  
13 court granted Pacificorp's motion for summary judgment, holding  
14 that Pacificorp had met its obligations to Baoding. (Doc. #94).  
15 In the same Opinion and Order, the court granted Super Power's  
16 motion to stay the action and compel arbitration, based on the  
17 agreement between Baoding and Super Power to arbitrate the disputes  
18 between them by referring such disputes to the CIETAC. (*Id.*)

19 On December 4, 2008, the court entered an order staying Super  
20 Power's counterclaims against Baoding, the only claims left in this  
21 case, pending arbitration. (Doc. #98). On January 21, 2010, the  
22 court entered an order denying Baoding's motion to lift the stay  
23 and denying Super Power's motion to dismiss its counterclaims  
24 against Baoding without prejudice. (Doc. #124). The parties were  
25 ordered to initiate arbitration within 30 days. Baoding filed an  
26 application with CIETAC to initiate arbitration on February 2,  
27 2010. (Barhoum Decl. Ex. 6.) The application was denied on  
28 February 11, 2010. (*Id.* at Ex. 6.)

1 On April 2, 2010, Baoding filed a renewed motion to lift the  
2 stay (doc. #135). On May 26, 2010, Super Power notified the court  
3 that it had filed an arbitration request, which CIETAC had  
4 accepted. (Notice Acceptance Third Party Def.'s Arbitration Demand  
5 Ex. A and B.) Super Power filed a supplemental brief in opposition  
6 to Baoding's renewed motion to lift the stay (doc. #144), asserting  
7 that because the parties can now assert their claims in  
8 arbitration, Baoding's renewed motion to lift the stay should be  
9 denied as moot. Baoding countered with a reply brief asserting,  
10 for the first time in this litigation, that Baoding is not a party  
11 to the Supplemental Agreement containing the agreement to  
12 arbitrate. Super Power filed a motion requesting leave to file a  
13 surrebuttal memorandum (doc. #148), and the court granted that  
14 motion.

15 Baoding argued that a different corporate entity, Baoding  
16 Tianwei Baobian Electric Co., Ltd., (hereinafter "Baobian") entered  
17 into the Supplementary Agreement containing the arbitration  
18 provision and any claims Baoding asserted against Super Power were  
19 unrelated to the pending arbitration. In its September 30, 2010,  
20 Opinion and Order (doc. #154) the Court found Baoding's arguments  
21 unavailing since Baoding had represented to the court on numerous  
22 occasions that it was a party to the arbitration provision in the  
23 Supplementary Agreement. Thus, that opinion concluded that Baoding  
24 was bound by the arbitration provision in the Supplementary  
25 Agreement, regardless of changes in the company name or nature,  
26 since it is the law of the case and departure was not warranted.

27 Super Power had also filed a renewed motion to dismiss without  
28 prejudice the counterclaims it asserted against Baoding, on the

1 ground that CIETAC's acceptance of the application for arbitration  
2 provides access to the agreed-upon forum for resolving those  
3 disputes. (Doc. # 151.) Baoding argued that if the court were to  
4 permit Super Power to dismiss its counterclaims, the court should  
5 also allow the filing of Baoding's counterclaims and/ or allow  
6 Baoding to file its counterclaims before dismissing Super Power's  
7 claims. The Court determined that the claims between Baoding and  
8 Super Power were subject to arbitration with CIETAC, therefore,  
9 Baoding was not permitted to assert new claims in order to maintain  
10 an action in district court and avoid arbitration. (Doc. #154.)  
11 Super Power's motion to dismiss its counterclaims without prejudice  
12 was granted. (*Id.*)

13 On March 24, 2011, Baoding filed its motion for an indicative  
14 ruling. (Doc. #160) The issue presented by this motion is whether  
15 the Court should grant a motion for relief from its September 30,  
16 2010, Opinion and Order. Super Power filed its opposition to  
17 Baoding's motion (doc. #164) on April 11, 2011.

#### 18 **Legal Standard**

19 As the parties acknowledge, this court lacks jurisdiction to  
20 modify, correct, or clarify its previous judgment while the case is  
21 on appeal. See *Sierra Pac. Power v. Hartford*, No. CV-00034, 2011  
22 WL 586417, at \*2 (D. Nev. Feb. 8, 2011). Federal Rule of Civil  
23 Procedure ("Rule") 62.1(a) pertains to relief pending appeal and  
24 provides that:

25 If a timely motion is made for relief that the court  
26 lacks authority to grant because of an appeal that has  
27 been docketed and is pending, the court may: (1) defer  
28 considering the motion; (2) deny the motion; or (3) *state*  
*that it would grant the motion if the court of appeals*  
*remands for that purpose or that the motion raises a*  
*substantial issue.*

FED. R. CIV. P. 62.1(a) (emphasis added). Rule 62.1 adopts the same procedure that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. FED. R. CIV. P. 62.1(a) advisory committee's notes. Thus, a motion for an indicative ruling can essentially be construed as a motion for relief under Rule 60(b). See *id.*; *Ray v. Pinnacle Health Hosp., Inc.*, Nos. 09-4508, 10-3571, 2010 WL 4704455, at \*8 n.3 (3d Cir. Nov. 22, 2010).

Under Rule 60(b), a court may relieve a party from a final judgment or order for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

FED. R. CIV. P. 60(b) (emphasis in the original).

### Discussion

Baoding contends that the Court should grant relief from its September 30, 2010, Opinion and Order ("the Order") because they cannot arbitrate their claims in China, which Baoding believes indicates "the circumstances justifying the Order have changed and relief from the Order is now warranted." (Pl.'s Mem. Supp. Mot. (doc. #161) at 6.) Specifically, Baoding wants the Court to lift

1 the stay and allow its claims to proceed in the district court.  
2 (*Id.*) Baoding argues that they complied with the Order and  
3 attempted to initiate arbitration of its claims. (*Id.* at 7.)  
4 However, their applications were denied on both occasions. (*Id.*)  
5 Thus, Baoding believes if the Court doesn't grant relief from the  
6 Order and allow them to assert its claims in district court, then  
7 they will be left without any recourse for the \$6 million dollars  
8 they are allegedly owed. (*Id.*)

9 Super Power counters by arguing that, "[h]aving been directed  
10 to finally and honestly submit its claims to arbitration before the  
11 [CIETAC], Baoding . . . returns yet again to this Court as part of  
12 what appears to be a sustained effort to avoid arbitration."  
13 (Third-Party Def.'s Opp'n (doc. #164) at 2.) Super Power argues  
14 that Baoding has presented no evidence of new facts or changed  
15 circumstances. (*Id.*) In fact, Super Power claims that the  
16 evidence provided by Baoding "suggests it is still trying to game  
17 the system." (*Id.*) Specifically, Super Power believes CIETAC's  
18 rejection notice suggest that Baoding failed to provide CIETAC with  
19 the proper information it would need to conclude that Baoding's  
20 claims against them must be arbitrated. (*Id.* at 2-3.)

21 Super Power goes on to state that, "[i]t strains credulity to  
22 believe that CIETAC would have issued its latest rejection notice  
23 if Baoding had affirmatively represented to CIETAC that it was a  
24 signatory to the Supplemental Agreement . . . which plainly  
25 requires arbitration in China." (*Id.* at 3.) Super Power then  
26 compares Baoding to "the boy who cried wolf" since they seek relief  
27 from the Order, "again suggesting that CIETAC has definitely  
28 'ruled' that Baoding's claims are not arbitrable." (*Id.* at 6.)

1 I find Baoding's arguments unavailing since the district court  
2 is not the only venue to seek recourse and Baoding's claims are  
3 arbitrable. In the September 10, 2008, Opinion and Order I made  
4 clear the parties are bound by a valid arbitration provision in the  
5 Supplementary Agreement.<sup>1</sup> Baoding had attempted to argue that  
6 Super Power is a stranger to the contracts between Winbo and  
7 Baoding due to a name change, however, that argument was rejected  
8 based, most notably, on the record demonstrating that Baoding was  
9 informed of the name change and received payments under the  
10 purchase contracts from Super Power.

11 Baoding then, despite contrary admissions to the court,  
12 attempted to argue that they were not a party to the Supplementary  
13 Agreement. (Doc. #145). Baoding argued that a different corporate  
14 entity, Baobian, entered into the Supplementary Agreement,  
15 therefore, Baoding was not bound by the arbitration provision.  
16 However, I rejected this argument because Baoding had represented  
17 on numerous times that it was a party to the arbitration provision  
18 in the Supplementary Agreement. (See doc. #154 at 4-5.)

19 On May 26, 2010, Super Power notified the court that CIETAC  
20 had accepted its arbitration request pursuant to the Supplementary  
21 Agreement. On November 5, 2010, however, Baoding petitioned the  
22 CIETAC to join "its claims" in the arbitration proceeding under the  
23 Supplementary Agreement. (See Doc. #162 Ex. 2 at 1.) On November  
24 23, 2010, Baoding's petition was denied because CIETAC determined  
25 that:

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28 <sup>1</sup>The parties often refer to this agreement as the Supplemental  
Agreement, rather than the Supplementary Agreement.



1 Considering Contract Win003/02-03 and Contract Win004/02-  
2 03 signed by your company and the Claimants are different  
3 from the disputed contracts in this Arbitration, no  
4 evidence shows that these two contracts are relevant to  
5 the dispute under this Arbitration and the contractual  
6 parties under th[ese] Contracts are different from the  
contractual parties of the agreements in connection with  
this Arbitration[.] After reviewing and consulting with  
the Commission, the arbitral tribunal from the Trade  
Arbitration Commission has made a decision of not  
granting your request for this Arbitration.

7 (Decl. Xiao Hui Chen (doc. #162) Ex. 2 at 1.)

8 On February 28, 2011, Super Power submitted a Petition for  
9 Withdrawal to the CIETAC, which provides:

10 The case number x20100240 was handled by the CIETAC which  
11 is about disputes relating to [the] Cooperation Agreement  
12 and Agency Agreement regarding the Phase Modulation  
13 Transformer. On December 20<sup>th</sup>, 201[0] and January 5<sup>th</sup>,  
14 2011, the Petitioner, Winbo International Corp. requested  
15 twice for an extension for submitting evidence to the  
16 CIETAC due to [the] extensive burden of proof to submit,  
17 additionally, the Holiday weeks of Christmas and New  
18 Year's are approaching soon, [so] it would be difficult  
19 for us to work on collecting the evidence. To  
20 Petitioner's greatest regrets, the CIETAC has not been  
taking any necessary consideration and understanding  
towards the Petitioner's adequate requests, and denied  
the Petitioner's extension requests. As a result, the  
Petitioner was unable to express the Petitioner's  
viewpoint sufficiently. In order to exercise the  
legitimate rights as a Petitioner, the Petitioner hereby  
petitions for withdrawal of the Petitioner's arbitration  
request. Please grant the related proceeding towards this  
withdrawal.

21 The Petitioner hereby states that the Petitioner's action  
22 of withdrawal would not damnify the Petitioner's  
23 litigation rights based upon relevant laws and contracts.  
24 We reserve all rights to request arbitration again from  
the CIETAC with the same facts and reasons against, the  
Respondent, Baoding Tianwei Baobian Transformer Electric  
Limited Liability Company.

25 (Doc. #162 Ex. 2 at 2.)

26 The parties representations and my subsequent orders make  
27 clear that there is no distinction between Baoding and Baobian nor  
28 between Super Power and Winbo. In fact, Baoding's own

1 representations confirm as much. For instance, as the September  
2 30, 2010, Opinion and Order stated:

3 **Baoding has represented to the court on numerous**  
4 **occasions that it is a party to the arbitration provision**  
5 **in the Supplementary Agreement.** See, e.g., Baoding's  
6 Memorandum at p. 1-2 (doc. #17) (Baoding a party to "a  
7 certain agreement that contains an arbitration  
provision"); Baoding Reply Memorandum at p. 1 (doc. #24)  
(admission that Baoding "was a party to an arbitration  
provision with, and did not intend to bring claims  
against Super Power").

8 (Doc. #154 at 4-5) (emphasis added). Moreover, in Plaintiff's  
9 Opposition To Super Power's Petition To Compel Arbitration (doc.  
10 #55), Baoding unequivocally stated that:

11 **Super Power relies on an arbitration provision in a**  
12 **contract entered into between Baoding and Winbo**  
13 **International on March 29, 2002. That Agreement provides:**  
14 **Baoding Tianwei Baobian Electric Co.,**  
15 **(hereinafter referred to as "BTW") and Winbo**  
16 **Internal Corp. (hereinafter referred to as**  
17 **"WINBO") have, through friendly consultations,**  
18 **reached a supplementary agreement....**

19 (Doc. #55 at 3) (emphasis added). As I previously referenced,  
20 Baoding was aware of Winbo's name change to Super Power. Thus, the  
21 Supplementary Agreement is obviously binding on Baoding and Super  
22 Power because they are the signatories despite its reference to  
23 Baobian and Winbo.

24 However, Baoding's second petition<sup>2</sup> to the CIETAC is  
25 misleading on this point and contrary to Baoding's contention that  
26 its "petition to join the arbitration was accurate and  
27 appropriate." (Pl.'s Reply (doc. #165) at 4.) For example, the  
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<sup>2</sup> Baoding appears to have submitted the court's September 10,  
2008, and September 30, 2010, Opinion and Order with its  
application to the CIETAC. (See Supp. Decl. Xiao Hui Chen Ex. 2.)  
However, this doesn't alter the fact Baoding's application, which  
describes the court's rulings, was misleading.

1 second petition initially defines Baoding as "the Company" and  
2 Baobian as "Respondent." (Supp. Decl. Xiao Hui Chen Ex. 2 at 1.)  
3 Baoding goes on to inform the CIETAC that on October 22, 2010,  
4 "[R]espondent's attorney" in the United States recommended that  
5 "the Company" should file a petition immediately to be added in  
6 arbitration under the Supplementary Agreement. (*Id.* at 2.) After  
7 reviewing the October 22, 2010, correspondence, however, the  
8 aforementioned "Respondent's attorney" is, in fact, John Barhoum,  
9 who represents Baoding ["the Company"] in this case. (*Id.* at 42-  
10 43.) The impression created is that Baoding and Baobian are two  
11 separate and distinct companies dealing with one another through  
12 their separate counsel. This was an erroneous impression to  
13 create.

14 In short, I find the second petition was ambiguously drafted  
15 by Baoding because separately defining itself as "the Company" and  
16 Baobian as "Respondent" was contrary to this court's ruling and  
17 contrary to their own representations. The second petition is  
18 riddled with examples of Baoding's efforts to distinguish itself  
19 from Baobian, which likely mislead the CIETAC. Nevertheless, the  
20 parties overlook the fact that filing a second petition was  
21 completely unnecessary given the CIETAC's acceptance of Super  
22 Power's petition pursuant to the Supplementary Agreement.

23 Here, Baoding contends that "its claims" against Super Power  
24 arise solely out of two contracts, Win003/02-03 and Win004/02-03.<sup>3</sup>  
25 (Pl.'s Reply (doc. #165) at 5.) The court disagrees. The  
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27 <sup>3</sup> Baoding refers to these contracts as the "August contract"  
28 and the "October contract," respectively. (See Pl.'s Mem. Supp.  
Mot. (doc. #161) at 3.)

1 Supplementary Agreement, as its name suggests, supplements the  
2 Cooperation Agreement and the Agency Agreement. The Agency  
3 Agreement named Super Power as Baoding's exclusive agent in the  
4 United States for the supply and sale of electrical transformers  
5 manufactured by Baoding. Section 4 of the Agency Agreement defines  
6 Super Power's Powers, Responsibilities and Obligations. (Doc. #52  
7 Ex. C at 1.) One of Super Power's defined responsibilities is to  
8 "Assist in Collecting Contracted Payment." (*Id.* at 2.)  
9 Specifically, section 4.7 of the Agency Agreement provides that  
10 Super Power "shall be responsible for investigating users' credit  
11 standings and assist [Baoding] in collecting contracted payment as  
12 scheduled and in full." (*Id.*)

13 This litigation arose out of a series of transactions entered  
14 into between Baoding, Super Power, and Pacificorp. Baoding had  
15 entered into two purchase contracts with Pacificorp for the  
16 manufacture and delivery of several electrical transformers. Super  
17 Power, as required by the purchase contracts and section 4.7 of the  
18 Agency Agreement, negotiated and issued the letters of credit.  
19 (Doc. #94 at 7.) It was also understood by all parties to the  
20 purchase contracts that Pacificorp would remit payment to Super  
21 Power and Super Power would remit payment to Baoding, *i.e.*, Super  
22 Power was *collecting payment* as Baoding's agent. (Doc. #94 at 6;  
23 Pl.'s Mem. Supp. Mot. (doc. #161) at 3.)

24 In connection with the two purchase contracts, Baoding and  
25 Super Power entered into two additional contracts, Win003/02-03 and  
26 Win004/02-03, which each related to one of the purchase contracts.  
27 Win003/02-03 required Super Power to remit payment to Baoding  
28

1 within 75 days of receipt of payment from Pacificorp. Win003/02-03  
2 contained an arbitration provision that provided:

3 Any dispute arising under or in connection with this  
4 contract, the parties shall attempt in the first instance  
5 to resolve such dispute through friendly consultations.  
6 If the dispute is not resolved in the manner within  
forty-five (45) days after the commencement of  
discussion, then the dispute shall be referred [to]  
arbitration in, China.

7 (Johnson Decl. (doc. #52) Ex. 7 at 2.) Baoding attempted to  
8 initiate arbitration pursuant to this provision, however, the  
9 CIETAC denied their application since the provision only referenced  
10 China and did not specify CIETAC as the specific arbitration agent.  
11 (Pl.'s Mem. Supp. Mot. (doc. #161) at 3 ; Supp. Decl. Xiao Hui Chen  
12 Ex. 2 at 44.) Win004/02-03, on the other hand, required Super  
13 Power to remit payment within 15 days and contained no arbitration  
14 provision.

15 Baoding attempts to have the court construe "its claims" in a  
16 vacuum by arguing that the alleged breach of contract and unjust  
17 enrichment arises solely out of Win003/02-03 and Win004/02-03. The  
18 relationship between this litigation and the Supplementary  
19 Agreement is undeniable, however. Although Win003/02-03 and  
20 Win004/02-03 specified an exact time to remit payment, the  
21 Supplementary Agreement is the overarching contract that requires  
22 Super Power to collect payment as Baoding's agent. Win003/02-03  
23 and Win004/02-03 refine the details of performance of the  
24 Supplementary Agreement.

25 Moreover, even assuming, *arguendo*, Baoding's second petition  
26 was necessary, the CIETAC's denial doesn't preclude its claims from  
27 being arbitrable. The CIETAC indicated the contractual parties  
28 under Win003/02-03 and Win004/02-03 are different from the

1 contractual parties under the Supplementary Agreement. However,  
2 this conclusion was likely based, at least in part, on Baoding's  
3 efforts to distinguish themselves from Baobian in the second  
4 petition. In addition, the CIETAC indicated that "no evidence"  
5 shows Win003/02-03 and Win004/02-03 are relevant to the dispute  
6 under the Supplementary Agreement. While the CIETAC's conclusion  
7 is erroneous, I cannot see how the CIETAC could draw the correct  
8 conclusion given the fact Baoding submitted an insufficient and  
9 misleading petition and Super Power seems to have presented no  
10 evidence to the CIETAC thereby acquiescing in this incorrect  
11 impression.

12 In sum, although the second petition was misleading, the  
13 arbitration accepted pursuant to the Supplementary Agreement is  
14 sufficient to address and resolve the disputes between them. Super  
15 Power is therefore ordered to re-institute the arbitration  
16 proceedings pursuant to the Supplementary Agreement. If, by  
17 chance, that petition is not accepted by the CIETAC, the court will  
18 reconsider a renewed motion from Baoding to lift the stay, and  
19 permit Baoding to file its proposed claims. To be clear, having an  
20 arbitration petition accepted by the CIETAC, failing to present the  
21 claims and defenses in good faith, voluntarily dismissing the  
22 arbitration, or allowing it to be dismissed without vigorous,  
23 accurate presentation of the facts does not constitute "arbitrating  
24 the claims." Both parties are ordered to make a good faith effort  
25 at arbitration. I will not entertain any further dilatory tactics  
26 from the parties, especially if I perceive those tactics as  
27 intentionally disobeying the court's orders. Failure to so proceed  
28 by Baoding may be deemed waiver of its claims. Failure by Super

1 Power may result in the stay to enforce the arbitration agreement  
2 being dissolved.

3 **Conclusion**

4 For the reasons stated above, Baoding's motion for an  
5 indicative ruling (doc. #160) is DENIED.

6 IT IS SO ORDERED.

7 Dated this 30th day of June, 2011.

8 /s/ Dennis J. Hubel

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Dennis James Hubel  
10 Unites States Magistrate Judge  
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